No. 15,749

IN THE

United States Court of Appeals

For the Ninth Circuit

MARIE GERMAINE ROSE ANNA BISAILLON,
Appellant,

vs.

WILLIAM A. HOGAN, District Director, Immigration and Naturalization Service, Honolulu,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

This brief is written in reply to appellee's answering brief, a printed copy of which was received through the mail on March 17, 1958. Appellant will not reply herein to the argument of appellee on each and every specification of error but this is not to be construed as a waiver of any specification on which no further argument is offered.

I and II.

THE DISTRICT COURT ERRED IN HOLDING THAT ANY VIOLATION OF SECTION 1542, TITLE 18, U.S.C. INVOLVES MORAL TURPITUDE, AND THAT APPELLANT'S VIOLATIONS OF THAT SECTION INVOLVE MORAL TURPITUDE.

Appellant does not take issue with appellee's statement that "Perjury is a crime involving moral turpitude". (Appellee's brief, p. 3.) In all the cases cited by appellee in support of this proposition the alien was either convicted of perjury or had admitted that he had committed the crime of perjury. We are not concerned in this case with Section 1182(a)(9), Title 8, U.S.C., which makes excludable any alien who admits he has committed a crime involving moral turpitude prior to entry.

The fact of the matter is that Appellant was neither charged with nor convicted of the crime of perjury. That the crime of perjury involves additional elements which must be proved, such as the oath and materialty of the false statement, which are not involved in proof of a violation of Section 1542, Title 18, U.S.C., is abundantly clear. It is also clear that the proof required to establish a perjury violation is more rigorous than the proof required to establish a violation of Section 1542. In this connection it should be noted that a violation of Section 911, Title 18, U.S.C., which provides as follows:

> "Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years or both,"

involves as much deceit or more deceit than a violation of Section 1542. *Duncan v. United States,* 9th Cir., 1933, 68 F. 2d 136, 143, cert. den. 292 U.S. 646. However, the Board of Immigration Appeals has held that a violation of Section 911 does not involve moral turpitude (*In the Matter of K,* 3 I. & N. 69, note p. 71) as did the Special Hearing Officer in this case.

The significant question then is not whether a violation of Section 1542 is "akin to perjury" but whether fraud is a necessary element of such a violation. The only case cited by the Appellee on this point is *United States ex rel Popoff v. Reimer,* 2 Cir. 1935, 79 F. 2d 513. In that case it was held that the making of a false statement in support of the application of another for naturalization aided the applicant in committing a fraud upon the government and that, therefore, the offense involved moral turpitude. It is submitted that if the *Popoff* case had been decided after the decision in *Bridges v. United States,* 1953, 346 U.S. 209, the Court would not have so held. In the *Popoff* decision the Court equated property frauds with false statements in obtaining rights of citizenship. The Supreme Court in the *Bridges* case has ruled that this equation is not correct. *Bridges v. United States,* supra at p. 221.

Appellee argues (Brief p. 6) that *United States v. Shoso Nii,* U.S.D.C. Haw., 1951, 96 F. Supp. 971, "merely narrows the scope of the Wartime Suspension of Limitations Act (18 U.S.C. § 3287) to offenses in which *fraud is named as an element* because of the

policy of repose rather than whether fraud is an actual necessary ingredient to the offense as charged." In that case the District Court quoted the following language from *United States v. Scharton,* 1932, 285 U.S. 518:

> "And as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds *not so denominated* by the statutes creating offenses."

In the *Scharton* case the Court held that a wilful attempt to defeat and evade the payment of income tax did not necessarily involve fraud. In *United States v. Grainger,* 1953, 346 U.S. 235, 243-244, which immediately follows the *Bridges* decision, the defendant relied on the passage quoted above from the *Scharton* case. He had been indicted for a violation of the False Claims Act and the District Court dismissed the indictment on the ground the period of limitations had run. The government appealed contending that the Wartime Suspension of Limitations Act should apply. The Supreme Court reversed stating:

> "We believe that Congress sought by its phrase 'involving fraud . . . in any manner' to make the Suspension Act applicable to offenses which are fairly identifiable as those in which fraud is an essential ingredient, *by whatever words they are defined,* and that Congress did not seek to limit its applicability to such of those identifiable offenses as also are labeled with a particular symbol." (Emphasis supplied.)

It appears clear from this language that the Supreme Court in the *Bridges* case directly held that fraud was not an essential element of the crime of making a false statement in a naturalization proceeding, and that the word "fraud" as used in the Wartime Suspension of Limitations Act was given its broadest possible meaning. The Court also stated in the *Grainger* case at page 243:

> "The statement of the offenses here carries with it the charge of inducing or attempting to induce *the payment of a claim for money or property involving the element of deceit that is the earmarks of fraud.*" (Emphasis supplied.)

In the light of the foregoing it is respectfully submitted that fraud is no more an essential element of a violation of Section 1542 than it is of a false statement to assist an applicant in gaining the benefits of citizenship.

In determining whether a conviction is based upon a crime involving moral turpitude the Courts

> ". . . must look only to the inherent nature of the crime as defined by law as to the facts charged in the indictment upon which the alien was convicted. The question does not depend upon unnecessary adjectives a zealous prosecutor may have added in the indictment to the essentials required by law nor upon the eloquent description of the offense by the prosecutor to court or jury . . ."
>
> "When by its definition the crime does not necessarily involve moral turpitude, the alien can-

not be deported because in the particular instance his conduct was immoral."

Annotation, 95 L. ed. 899, 902-903.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT'S DEPORTATION HEARING WAS A FAIR HEARING IN THAT SHE WAS DENIED HER RIGHT TO COUNSEL.

At the time of the hearing before the Special Inquiry Officer Appellant was a prisoner confined in Oahu Prison, Honolulu, Territory of Hawaii. Appellee, in arguing that Appellant voluntarily waived her right to counsel, has apparently overlooked some of the following testimony appearing in Exhibit 8:

"p. 6. 'Q. We are going to proceed with this hearing whether or not Mr. Poston is your attorney,——

A. Well, I mean to say——

Q. ——do you understand that?

A. Yes. I understand that if I would have a final action from Mr. Poston, well, then this case would be different.' "

"p. 8. 'Q. You will be given to 1 PM tomorrow to secure counsel. In the event you do not have counsel, the hearing will proceed. Do you understand?

A. If you want we can proceed—you can proceed with the hearing, right now.

Q. You have to say yes or no about counsel. I can't take a half answer. You do not say yes. You do not say no.

A. Okay, I'll say yes.' "

It is to be noted that it was unlikely that Appellant could have obtained counsel by 1 p.m. the next day (R. 33, 35-36). After the additional charges, on which Appellant was eventually found deportable, were lodged during the first day of the hearing the Appellant asked for additional time to get an attorney and meet the charges. Appellant requested that the hearing be continued over the following weekend so she could make arrangements to obtain counsel through friends who would visit her on Sunday. This request was denied and the hearing was continued to the following Friday (Ex. 8, pp. 14-15).

Appellee contends that no prejudice resulted from lack of counsel because Appellant's deportability is clear. Appellee forgets that this is a case of first impression and that both parties have had to resort to arguments by analogy to support their respective positions.

IV.

THE DISTRICT COURT ERRED IN RECEIVING INTO EVIDENCE THE INFORMATION AND THE INDICTMENT CHARGING APPELLANT WITH VIOLATIONS OF SECTION 1542, TITLE 18, U.S.C.

Attention is called to the fact that an appeal is pending from the decision of this Court in *Tseung Chu v. Cornell,* 9th Cir., 1957, 247 F. 2d 929.

CONCLUSION.

For the reasons set forth in Appellant's opening brief and in this brief, it is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Honolulu, T. H.,
March 24, 1958.

HOWARD K. HODDICK,
Attorney for Appellant.